IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 150 of 1997.

Judgement reserved on: 24.10.2007.

Date of decision: 29.11.2007.

Amar Chand ….. Appellant.

Vs.

Sita Devi …. Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Ajay Kumar, Advocate.

For the Respondents : None.

Kuldip Singh, Judge.

This appeal has been directed against the judgement, decree, dated 23.4.1997, passed by the learned District Judge, Kangra in Civil Appeal No. 80-G/XIII/95 reversing the judgement and decree dated 23.2.1995 passed by learned Sub Judge Ist Class, Dehra in Civil Suit No. 166/87.

2. The facts in brief as emerge from the plaint are that respondent Sita Devi filed a suit for declaration, injunction and in the alternative for possession that she is natural and legal successor of deceased Bakshi Devi and is owner in possession of the properties, mentioned in detail in plaint. Bakshi Devi was living for the last

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Whether the reporters of the local papers may be allowed to see the Judgment?

about ten years with Maghar Singh, special attorney of respondent Sita Devi, who used to serve and provide her with all necessities of life. She died on 23.6.1986. In May, 1985, appellant took Bakshi Devi from the house of Maghar Singh on the pretext that he would get her medically treated at Pragpur. At that time she was ailing and had gone very weak and was not in sound disposing mind. On 10.12.1985, he got prepared a fictitious will of Bakshi Devi. In fact, Bakshi Devi had not executed any will. Respondent Sita Devi is the nearest living successor of the deceased Bakshi Devi and has inherited the estate of Bakshi Devi. She is owner in possession of the properties left by Bakshi Devi. The appellant is strong headed person and he is threatening to interfere in the properties left by Bakshi Devi, which are in possession of respondent Sita Devi. On these grounds, the suit was filed by respondent Sita Devi.

3. The suit was contested by appellant by filing written statement, in which he took preliminary objections of locus-standi, maintainability and suit is vexatious. On merits, it has been submitted that Bakshi Devi was used to stay with the appellant, who is her nephew. Bakshi Devi has executed a will in favour of the appellant on 10.12.1985. The appellant is in possession of the properties left by Bakshi Devi after her death. The will executed by Bakshi Devi in his favour is not the result of fraud, misrepresentation and undue influence. The learned Sub Judge on 30.6.1993, decreed the suit. Respondent Sita Devi filed an appeal, which was allowed on 8.6.1994 by learned Additional District Judge (I), Kangra, who remanded the suit to trial court with the direction to record the evidence of appellant

(defendant) de-novo in connection with the original will dated 10.12.1985. The learned Sub Judge under issue No.2 held that Bakshi Devi executed the will in favour of Amar Chand and dismissed the suit on 23.2.1995. The decision dated 23.2.1995 was assailed in appeal and learned District Judge, Kangra, allowed the appeal on 23.4.1997 and held that Bakshi Devi did not execute any will in favour of Amar Chand and decreed the suit. Hence, Amar Chand is in appeal against judgement, decree dated 23.4.1997.

4. The appeal has been admitted on following substantial questions of law:-

1. Whether the findings of the Appellate Court, in the facts and circumstances of the case, are arbitrary or based upon distorted view of evidence and by ignoring material facts and evidence and if so to what effect?

2. Whether there is a initial presumption of genuineness to a Registered will and what are the legal requirements for proving a registered will which is attacked on the allegations of fraud, undue influence and misrepresentation etc.?

3. What are the legal requirements of pleadings in a suit when the case is based upon allegations of fraud, undue influence and misrepresentation etc.?

4. Whether the allegations of fraud, undue influence and misrepresentation are cognate to each other and overlap each other or they are distinct and independent causes of action and are required to be pleaded with specificity, particularity and precision?

5. What is the effect in case separate, particulars and precise allegations of fraud, undue influence and misrepresentation are not made in the pleadings and no evidence led on the same?

5. I have heard the learned counsel for the appellant and gone through the record. The learned counsel for the appellant has submitted that lower appellate court has erred in returning the finding that Bakshi Devi has not executed will Ex. DW 5/A in favour of Amar Chand. The will is registered and has been proved on record in accordance with law. There are no suspicious circumstances. Bakshi Devi was in sound disposing mind when she executed the will in favour of Amar Chand. Sita Devi has taken the plea of fraud etc. on the part of Amar Chand for execution of the will, which has not been pleaded in accordance with law nor proved. This is an additional fact to hold that Bakshi Devi had executed will in favour of Amar Chand.

Substantial questions of law No. 1 to 5:

6. The substantial questions of law No. 1 to 5 are interconnected, therefore, they are being disposed of collectively.

7. The basic question is execution of will Ex. DW 5/A by Bakshi Devi in favour of Amar Chand. The learned counsel for the appellant has submitted that since will Ex. DW 5/A is registered document, therefore, it is a strong circumstance to uphold the validity of the will. In **Rani Purnima Debi and another** vs. **Kumar Khagendra Narayan Deb and another** AIR 1962 SC 567, it has been held that mere fact that the will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists. It

is not unknown that registration may take place without the executant really knowing what he was registering. The mere fact of registration of will is not sufficient to remove all suspicious circumstances that may attach to the execution and attestation of a will. The registration of a will in itself is not the proof of due execution of the will, even a registered will is to be proved like any other will and all suspicious circumstances are to be explained by the propounder of the will, he cannot take shelter under the fact that the will is registered, therefore, it is genuine.

8. The learned counsel for the appellant has submitted that since the respondent has taken a plea of fraud, misrepresentation and undue influence played by appellant on Bakshi Devi for executing the will Ex. DW 5/A, dated 10.12.1985, the burden lies on respondent Sita Devi to prove such fraud, misrepresentation and undue influence. He has submitted that fraud, misrepresentation and undue influence has not been pleaded in accordance with law nor there is any evidence to this effect on record. He has submitted that in these circumstances, due execution of the will has been proved coupled with other evidence on record. In **H. Venkatachala Iyengar** vs. **B.N. Thimmajamma and others** AIR 1959 SC 443, the Hon'ble Supreme Court has held that it is true that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of

the initial onus to remove any such legitimate doubts in the matter. Therefore, in the light of the law laid down by the Hon'ble Supreme Court, the burden remains on the propounder of the will to remove any doubt with respect to the due execution of the will.

9. PW 1 Maghar Singh, special attorney of respondent Sita Devi has stated that Bakshi Devi was aunt (Tai) of Sita Devi. On the death of Bakshi Devi, Sita Devi has succeeded her. DW 1 Amar Chand has stated that Bakshi Devi has executed a will of her properties in his favour, which was registered. At the time of writing the will, ward Panch, Lambardar, an Advocate, Tehsildar and his Reader were present.

10. DW 5 Anil Rana, Advocate has stated that will Ex. DW 5/A was scribed by him at the instance of Bakshi Devi. The attesting witnesses were Jagdish Chand and Roshan Lal. Bakshi Devi was in sound disposing mind, will Ex. DW 5/A was read over to Bakshi Devi, which was accepted to be correct by her, she put her thumb mark and attesting witnesses also put their signatures. This witness has not stated who called him for writing the will.

11. DW 6 Roshan Lal has stated that will Ex. DW 5/A was got executed by Bakshi Devi and was scribed by DW 5 in the house of Amar Chand at Pragpur. Tehsildar, five-seven villagers and an Advocate were present at that time. He attested the will and other witness was Desh Raj, Numberdar. In cross-examination, he has stated that for 5-7 years she had been visiting the house of Amar Chand. She died five-six months after the execution of the will. Desh Raj is alive and he came 4-5 minutes after him. The will was signed

by him and Numberdar and testatrix put her thumb mark. Desh Raj also signed it. He and Desh Raj put two signatures before Tehsildar.

12. DW 7 Jagdish Chand has stated that will Ex. DW 5/A was written in the house of Amar Chand. He signed the will as witness. The will was written by an Advocate. Bakshi Devi put her thumb mark on the will. In examination-in-chief, he has stated that second witness was Roshan Lal, but he did not identify the signatures of Roshan Lal on the will. In cross examination, he has stated that he does not know which witness put thumb mark. The statement of this witness was recorded before the remand of the case also. In that statement, he has stated that after the testatrix put her thumb mark on the will, others also signed the will. He signed the will in the last. The others, who put the signatures are Ward Panch and one Chowkidar Bansi Lal. He cannot identify the signatures of Roshan Lal. This is the entire evidence with respect to execution of the will.

13. Appellant Amar Chand has admitted that at the time of execution of will Ex. DW 5/A, Bakshi Devi was about 85-86 years old. The will was scribed by DW 5 Anil Rana, Advocate at the residence of Amar Chand. DW 5 has not stated who called him for writing the will. There is no specific evidence on record whether testatrix actually called the scribe and attesting witnesses before execution of the will and Sub Registrar for registration of the will. The Sub Registrar, who registered the will has also not been examined, therefore, endorsement of registration of the will has not been proved. The perusal of will Ex. DW 5/A would show that it is allegedly attested by Roshan Lal and Jagdish Chand. Roshan Lal appeared as DW 6

and has stated that second witness of the will was Desh Raj, Numberdar. There is no attesting witness by the name Desh Raj on will Ex. DW 5/A.

14. DW 7 Jagdish Chand has stated that he is an attesting witness of will Ex. DW 5/A, but his statement has been contradicted by DW 6 Roshan Lal when he has stated that other witness of the will was Desh Raj, Numberdar. Before remand of the suit, Jagdish Chand was examined as DW 4 and at that time he has stated that one Chowkidar Bansi Lal also signed the will alongwith him and Ward Panch. DW 5 Anil Rana scribe and DW 6 Roshan Lal have not stated that will was signed by Bansi Lal, Chowkidar. There are no signatures on the will Ex. DW 5/A of Bansi Lal, as attesting witness or in any other capacity. DW 6 Roshan Lal has named Desh Raj the other person, who signed as a witness. He has not stated that Desh Raj is also known by the name of Jagdish Chand.

15. DW 7 Jagdish Chand in his address has disclosed his name Jagdish Chand alias Desh Raj. This description of Jagdish Chand appears to be afterthought. The statement of Jagdish Chand was earlier recorded as DW 4 but at that time he did not give his description as Jagdish Chand alias Desh Raj. Jagdish Chand has given his description as Jagdish Chand alias Desh Raj when he appeared as DW 7 simply to match the statement of DW 6 Roshan Lal when he stated that the other witness of the will was Desh Raj. It has not been established that will Ex. DW 5/A was attested by two witnesses. The cumulative effect of the above evidence is that

execution of the will has not been proved in accordance with Section 63 of the Indian Succession Act.

16. DW 1 Amar Chand has stated that Bakshi Devi served as a Nurse at Jabbalpur and she retired as such from that place. It is, therefore, reasonable to infer that she was literate. The will Ex. DW 5/A is allegedly thumb marked by Bakshi Devi. It has not been explained why Bakshi Devi thumb marked the will Ex. DW 5/A instead of putting her signatures on it. There is no explanation to this effect in the will Ex. DW 5/A nor this has been explained otherwise by scribe and attesting witnesses of the will. It appears Bakshi Devi was not keeping good health. She was not in sound disposing mind. She was not aware what document she was preparing. The above noted suspicious circumstances have not been explained by the testator. It has not been pointed out what material evidence has been ignored by the courts below. The lower appellate court has appreciated the pleadings and evidence on record in right perspective. The execution of the will is a finding of fact. The learned lower appellate court has recorded a finding that Bakshi Devi has not executed any will in favour of Amar Chand. No case for interference has been made out. The substantial questions of law No.1 to 5 are decided against the appellant.

17. No other point was urged.

18. The result of the above discussion, the appeal fails and the same is accordingly dismissed.

November 29, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**